

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RANDOLPH PHILLIPS,

Plaintiff-Appellant,

-v-

ALLEGHANY CORPORATION,

Defendant-Appellee.

INVESTORS DIVERSIFIED SERVICES, INC.,

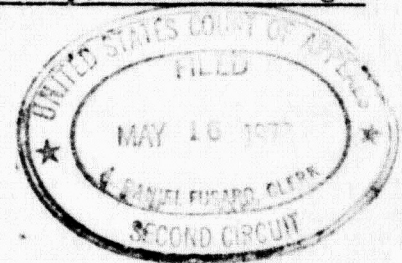
Defendant.-Appellee.
-----x

C/A DOCKET NO. 77-7055

72 Civil 1544

On appeal from Judgment
and Orders Dismissing
Amended Complaint and
Vacating Default Judgment

Frankel, Brieant and
Tenney, District Judges.



REPLY BRIEF FOR RANDOLPH PHILLIPS

RANDOLPH PHILLIPS
Plaintiff-Appellant Pro Se
30 East 72nd Street
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212-734-6776

REPLY ARGUMENT

POINT I

ALLEGHANY CORPORATION WAIVED EACH OF THE GROUNDS IT NOW ASSERTS IN ITS BRIEF UNDER POINT I TO SUPPORT THE JURISDICTION OF JUDGE FRANKEL AND HIS ORDER OF JUNE 15, 1972 VACATING THE DEFAULT JUDGMENT WHEN IT FILED ITS NOTICE OF APPEAL FROM THAT JUDGMENT ON JUNE 8, 1972 AND THEREAFTER ON ITS OWN MOTION PROCURED DISMISSAL OF ITS APPEAL FROM THE DEFAULT JUDGMENT ON JULY 20, 1972. (89a-92a; 95a)

POINTS WAIVED: I

THAT

- " A. The Filing by Alleghany of a Protective Notice of Appeal, Never Docketed, Did Not Divest Judge Frankel of Jurisdiction to Vacate a Default Judgment Entered by Clerical Error Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure."
-

This "clerical error" argument was the exact argument urged before Judge Frankel by Alleghany in attorney Bond's moving affidavit sworn May 15, 1972 for a vacatur of the Default Judgment. (27a-28a, par. 11) *

* Attorney Bond's words in his May 15, 1972 affidavit were "11. It should be stressed that the Clerk's Certificate Noting Default dated May 12, 1972 was certified in error." (emphasis supplied) He then directly refers to Judge Lasker's "Order Ex Parte" "on May 10, 1972" "extending defendant Alleghany Corporation's time." (27a-28a)

It does not help Alleghany's cause to call its appeal "protective"; all appeals are.

And it was the basis for Judge Frankel's grant of the motion. (56a, (1)). Thus the facts on which "A" of "POINT I" is based were known to attorney Bond 4 months and 10 days before Alleghany procured on its own motion the dismissal of its appeal from the Default Judgment by order of Judge Briant. (89a-92a, 95a). Thus five years ago attorney Bond knew of this ground for vacating the judgment prior to his obtaining dismissal of his appeal. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464. It is "voluntary," "knowingly," and "intelligently made". Brady v. United States, 397 U.S. 742, 748. It is plain that attorney Bond's dismissal of his appeal was "intentional" and that it was of a "known right. Since he had available to him the back-up facilities of Marshall, Bratter, Greene, Allison & Tucker, "a substantial firm" of which he "is a member" "with more than 70 attorneys and offices in New York and Washington and who, it must be assumed are in control of their own litigation matters" (MEMORANDUM by Tenney, D.J. at Joint Appendix 366a), it must be further assumed that Bond's decision was "intelligently made". Brady, supra.

"If the District Court had erred in dealing, or in failing to deal with any issue thus involved (here the Rule 60(a) issue) the remedy was by appeal and no appeal was taken." Jackson v. Irving Trust Co., 311 U.S. at 499-500.

POINTS WAIVED: II

THAT

- " C. The District Court Correctly Dismissed Alleghany For Lack of Subject Matter Jurisdiction.

" On September 25, 1972, Judge Brieant granted Alleghany's motion to dismiss (97a - 98a), holding that, "The complaint does not plead a recognized statutory basis for subject matter jurisdiction over movant as required by Rule 8(a)(1), F. R. Civ. P." (97a)."

This ground was known to Alleghany counsel at least as early as June 27, 1972, the date of its Notice of Motion for an order "dismissing the complaint as to defendant Alleghany Corporation for lack of jurisdiction over the subject matter." (78a, par. (a)). Thus Alleghany's dismissal of its appeal on July 20, 1972 was also as to this ground "an intentional relinquishment or abandonment of a known right" "voluntarily, knowingly and intelligently made". Zerbst and Brady, supra. The fact that Mr. Bond pursued the matter and obtained a decision in his favor on this motion from Judge Brieant on September 25, 1972 is irrelevant since the waiver is of the right to urge this ground in this Court of Appeals. That Alleghany had this right on the basis of its June 8, 1972 Notice of Appeal is unquestionable.

Alleghany's self-procured dismissal of its appeal thus waived the right to object to the entry of the Default Judgment on this ground. It cant be resurrected here in the form of an appellee's brief five years later. Also there is no question that a default judgment is not subject to collateral attack where defendant "appears but fails to contest jurisdiction." 7 Moore's Federal Practice, section 60.25(2), p.269. (ed.) By filing the June 8,1972 Notice of Appeal Alleghany plainly appeared in this Court and thereafter by obtaining the July 20,1972 dismissal of that appeal failed "to contest jurisdiction". It may not try a second time in this Court since the Default Judgment is final and res judicata. For that reason its attack five years later ^{IN} on its Brief herein filed on May 2,1977 is a collateral attack.

"The principles of res judicata apply to questions of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Association, 283 U.S.522." American Surety Co. v. Baldwin, 287 U.S.156,166.

Additionally, apart from the question of waiver, Judge Brieant lacked jurisdiction to enter his order dismissing the complaint. As the Seventh Circuit stated in Madden v. Perry, 264 F.2d 169 (1959) at 174:

"But we dismissed the appeal without reversing and this left no case pending before (District) Judge Perry and hence his entries of findings and conclusions thereafter were not germane to any action in his court. Their entry was error." (emphasis supplied)

Assuming, arguendo, there was no waiver by Alleghany, its argument on the merits is erroneous at all points.

POINT II

IT IS THE LAW OF THE SECOND CIRCUIT THAT RULE 60(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE "DOES NOT CONFER ON A DISTRICT COURT THE POWER TO VACATE A JUDGMENT AFTER AN APPEAL HAS BEEN FILED." Daniels v. Goldberg, 8 F.R.D. 580 (S. D. N. Y. 1948, Kaufman, D.J.), aff'd 173 F.2d 911 (2 Cir. 1949). ACCORDINGLY, ALLEGHANY'S POINT ONE ARGUMENT BASED ON RULE 60(a) IS WITHOUT MERIT.

A. In Daniels v. Goldberg, supra, Judge Kaufman ruled on

Motion to Vacate

The first question presented is whether this court has jurisdiction, after a notice of appeal has been filed, to vacate a judgment on the ground specified. Prior to the amendments of the Federal Rules of Civil Procedure, which became effective in March of 1948, the general view was that after a notice of appeal was filed the district court had no authority to proceed further except in aid of the appeal. Miller v. United States, 7 Cir., 114 F.2d 267; Fiske v. Wallace, 8 Cir., 115 F.2d 1003, certiorari denied 314 U.S. 663, 62 S.Ct. 123, 86 L.Ed. 531; Jordan v. Federal Farm Mortgage Corporation, 8 Cir., 152 F.2d 642, certiorari denied 328 U.S. 852, 66 S.Ct. 1339, 90 L.Ed. 1624; Schram v. Safety Inv. Co., D. C., 45 F.Supp. 636.

[1] The amendments to the Rules specifically give to the district court power to act in certain instances after an appeal has been filed, Rules 60(a) and 73(a), but none of these confer on a district court the power to vacate a judgment after an appeal has been filed.

Under Rule 73, an appeal is perfected by filing a proper notice of appeal, and the filing of that notice vests jurisdiction of the case in the appellate court. Wallack v. Hudspeth, 10 Cir., 128 F.2d 343, 344. Thereafter the district court has no authority to entertain a motion to vacate its judgment without the permission of the Court of Appeals. Miller v. United States, supra; Schram v. Safety Investment Co., supra; International Ry. Co. v. Davidson, D. C., 65 F.Supp. 58; 3 Moore's Federal Practice (1947 Supplement) p. 326, n. 1.

In short, a motion to vacate a judgment is not a motion to correct "CLERICAL MISTAKES" under Rule 60(a). Were it such a motion the provisions of Rule 60(a) permit such a correction "During

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the pendency of an appeal, * * * ." Judge Kaufman's decision has not been overruled. Judge Friendly cites it in support of his decision in Weiss v. Hunna, 312 F.2d 711 (2 Cir.1963), cert. den. 374 U.S. 853 (1963), which holds that the filing of a Notice of Appeal divests the district court of jurisdiction to grant or deny relief under Rule 59 or Rule 60(b) except with our permission." (312 F.2d at 335-338)

B. Rule 55(c) of the Federal Rules of Civil Procedure places the power to vacate a Default Judgment solely within the scope of Rule 60(b).

55-231

SETTING ASIDE, ANALYSIS

¶ 55.10[1]

Rule 55(c)

(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

¶ 55.10. Setting Aside Default and Default Judgment.

[1]—General Analysis.

Rule 55(c) properly makes a distinction between relief from a default, which involves an interlocutory matter, and relief from a judgment by default, which involves final judicial action.

Under subdivision (c) the court is authorized to set aside an entry of default¹ for "good cause shown"; and to set aside a judgment by default, if one has been entered, in accordance with Rule 60(b).²

(6 MOORE, Federal Practice, at 55-231)

As stated by the Third Circuit in United States v. Stuart, 392 F.2d 60 (1968):

" (1) Without seeking to refine the matter unduly, it seems to us that Rule 60(a) is concerned primarily with mistakes which do not really attack the party's fundamental right to the judgment at the time it was entered. It permits the correction of irregularities which becloud but do not impugn it. To that end 60(a) permits, inter alia, reasonable additions to the record. In contrast, Rule 60(b) is concerned with changing a final judgment, etc. In such a case the moving party understandably shoulders a much heavier burden." (p. 62) *

* Alleghany states that "the current viability" of the jurisdictional law of Weiss v. Hunna, supra, 312 F.2d 711 (2 Cir.1963), "was placed in serious question by the reasoning of the Supreme Court in Standard Oil Co. of California v. U.S., - U.S. -, 97 S.Ct. 31 (1976)." (Brief 21). The procedure therein set forth relates to judgment after appeal, not to a party's self-dismissed appeal. The Opinion relates to the mandate after appeal, not to divestment of district court jurisdiction before an appeal was determined. In any event, the rule suggested by the Supreme Court is prospective in application and since the Default Judgment is res judicata and became so on July 20, 1972 when Alleghany caused its appeal therefrom to be dismissed, it would not have and could not have constitutionally any retroactive effect on that judgment.

The "axiom" cited by Chief Justice Warren in American Trucking Ass'n v. Frisco Transp. Co., 358 U.S. 133, 135 (1958), quoted by Alleghany (Brief 17), did not state "the duty to correct" was "the power to vacate a judgment" after an appeal has been filed."

The "power to vacate a judgment" under Rule 60(b), which is set forth in Rule 55(c) could not be transferred to Rule 60(a) by this Court unless the new rule were first reported to Congress and then, after opportunity for hearing, not disapproved by it. 28 U.S.C. 2072.

C. Alleghany Corporation is barred by the Statute of Limitations from now obtaining any correction of its alleged "clerical error" under Rule 60(a) of the Federal Rules of Civil Procedure

We quote the syllabus in Warner v. City of Bay St. Louis, 526 F.2d 1211 (5 Cir.1976):

1. Federal Civil Procedure §2656

Under rule 60(a), entitled "Clerical Mistakes," court may correct errors, created by mistake, oversight or omission, that cause record or judgment to fail to reflect what was intended at the time of trial. Fed.Rules Civ.Proc. rule 60(a), 28 U.S.C.A.

2. Federal Civil Procedure §2658

Errors that affect substantial rights of parties are outside scope of rule 60(a) pertaining to "Clerical Mistakes"; such errors may be corrected under rule 60(b) if brought to attention of district court within one-year time limit. Fed.Rules Civ.Proc. rule 60(a, b), 28 U.S.C.A.

3. Federal Civil Procedure §2656

Where judgment stated amount of interest at 6% and such amount was intended by district court, any mistake in entering amount of 6%, instead of 8% in accordance with recent change in state law, was not correctable under rule 60(a) pertaining to "Clerical Mistakes." Fed. Rules Civ.Proc. rule 60(a), 28 U.S.C.A.

4. Appeal and Error §238(6)

A motion to amend a judgment to correct an error of law pursuant to rule 60(b) must be first made in district court. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

And [1.2] Rule 60(a) is entitled "Clerical Mistakes."² Under this rule the court may correct errors, created by mistake, oversight, or omission, that cause the record or judgment to fail to reflect what was intended at the time of trial. See *Pattiz v. Schwartz*, 386 F.2d 300 (8th Cir. 1968); *Ferraro v. Arthur M. Rosenberg Co.*, 156 F.2d 212, 214 (2d Cir. 1946).

Since the court is correcting merely clerical errors, Rule 60(a) explicitly states that the correction may be made at any time. See Moore, *Federal Practice*, Vol. 6(a), § 60.06[1], pp. 4053-54 (1973). In contrast, errors that affect substantial rights of the parties are outside the scope of Rule 60(a). See *United States v. Stuart*, 392 F.2d 60 (3rd Cir. 1968). Such errors may be corrected under Rule 60(b)³ if brought to the attention of the district court within the one year time limit.

- D. Alleghany's reliance on Judge Lasker's ex parte order extending its time is misplaced. It is a nullity because it was not procured in compliance with Rule 6(b), Fed.R.Civ.Proc. *

Judge Lasker's ex parte ^{order} /of May 10, 1972 (13a) could not lawfully be made the basis for either a motion under Rule 60(a) or Rule 60(b) because it was not procured in compliance with the requirements of Rule 6(b) of the Federal Rules of Civil Procedure, pursuant to which it was purportedly issued.

- (i) The delay of the \$9 billion Alleghany Corporation in retaining an attorney for 19 days out of the 20 days permitted it under Rule 12(a) of the federal rules to answer or move against the complaint is not "cause shown", much less "good cause" to quote Judge Lasker's order (Joint Appendix 13a), for issuance of the Rule 6(b)(1) order. *

* This ex parte order is the foundation of Alleghany's contention of an "Improper Default Judgment Against Alleghany." (Brief 7, 15, 20).

In his moving affidavit attorney Richard L. Bond stated:

"2. My firm was retained to represent Alleghany Corporation in this action in the afternoon of May 9, 1972. I am advised that defendant Alleghany Corporation was served with summons and complaint on April 20, 1972. Accordingly, absent an extension, its time to answer or move expires on May 10, 1972." (Joint Appendix 14a).

In his May 10, 1972 order Judge Lasker stated "good cause" had been "shown for the relief requested." (13a). *

"RULE 6. Time." of the Federal Rules of Civil Procedure states in pertinent part:

" (b) ENLARGEMENT When by these rules (here Rule 12(a)) ...an act is required to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed..."

Plainly the delay of Alleghany in retaining an attorney for 19 days out of the 20 days permitted it under Rule 12(a) to answer or move against the complaint is not "good cause shown".

United States of America v. York Electric Construction Co.,

25 F.R.D. 478 (USDC North Dakota). As stated therein:

* "...Rule 6(b) provides for enlargement of time in certain cases by the court for 'cause shown'. This I think is the equivalent of 'good cause shown.'" Poe v. Cristina Copper Mines, 15 F.R.D. at 88.

"It seems incredible that any reasonably prudent person under the circumstances here existing would not have promptly, after being served in each of these actions, consulted competent counsel. The short answer ... is that legal counsel should have been retained promptly, and that a reasonably prudent person would have taken such action under the same or similar circumstances... judgment by default will be taken for the relief demanded in the complaint." (25 F.R.D. at 479-481, emphasis supplied) (quoted in 4 Wright & Miller, Federal Practice & Procedure, note 67, p. 621) *

The Missing Alleghany Affidavit

Alleghany proffered no affidavit from any of its officers or counsel, as required by York, explaining why the defendant corporation, which controls some \$9 billion in assets and uses the 200 lawyer staffed law firm of Donovan Leisure Newton & Irvine needed 19 days to determine whether to retain an attorney to defend against the claim of a plaintiff pro se.

Phillips raised this issue below in his affidavit in opposition to Alleghany's motion to vacate the Default Judgment (47a) and

* Wright & Miller, supra, cite the same cases for Rule 6(b)(1) for "cause shown" as for "excusable neglect". Rule 6(b)(2), notes 64, 67. pp. 620, 622, indicating their equivalence, at least as to proof.

his supporting Memorandum, which cited York. (Record Doc. 10)

But Judge Frankel failed to rule on the issue.

(ii) There is an additional barrier to the validity of Judge Lasker's ex parte order of May 10, 1972. The "cause shown" was not the "cause" of defendant Alleghany Corporation, but of attorney Bond who needed more time because Alleghany had delayed 19 days in retaining him. The "cause shown" must be that of the party, not of the attorney. York, supra. *

As stated by Wright & Miller in Federal Practice & Procedure, s 1165, p. 620:

" * * * As the court may exercise its discretion under Rule 6(b)(1) only for 'cause shown,' a party must demonstrate some justification for the issuance of the order. (citing cases)

* Appellant relies on this Court's Opinion in Welden v. Grace Line, 404 F.2d at 76 (2d, Cir.)

[4] We are cognizant of the problems facing the district courts in coping with their overburdened dockets, a problem which often is aggravated by procrastination or dilatory tactics on the part of counsel. See Davis v. United Fruit Co., 402 F.2d 328, at pp. 330-331 (2d Cir. Oct. 3, 1968). Normally, we readily refer to the exercise of a broad discretion by the district court in these matters, a discretion which is absolutely necessary if the calendars of the country's busiest district court are to be handled in the best interest of litigants,

the bar and the court. But we cannot defer when confronted with a clear error in law.

A party's "justification" is obviously different from an attorney's.

Thus Wright & Miller, supra, state at page 622:

" * * * Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules. (citing cases; emphasis supplied)

And Moore in his discussion of "Practice Under Rule 6(b)", Vol. 2 at 1500.69, par.6.08, states:

"Rule 6(b) requires a party to show some cause for an order enlarging the time ."

The affidavit of attorney Bond in seeking the 6(b) order shows no "cause" by the party, defendant Alleghany Corporation, but only his "cause" as an attorney for extra time because the party did not retain him until 19 days after it was served with the summons and complaint. And his affidavit does not even explain the 19 days delay by Alleghany ! Clearly, Judge Lasker abused his discretion in signing the ex parte order of May 10, 1972 on such an inadequate application.

And just as clearly that order for its failure to comply with the requirements of Rule 6(b) is a nullity and may not be used in defense of Alleghany's default or to upset the judgment. *

* There was no Rule 6(b) issue in National Equipment Rental, Ltd. v. Figurine Salon of California, Inc., 19 F.R.Serv. 2d 1426, 1428. (E. D. N. Y. 1975), cited by Alleghany. (Brief 18-19). There also was no appeal from a Rule 60(b) order, as here; no "motion specified Rule 60(b)" (Brief, 19, third line from bottom); no issue of waiver or res judicata; and no mention nor application of Daniels v. Goldberg, supra; and finally it does not appear that the Rule 60(a) issue was contested.

E. The "clerical error" argument of Alleghany is based on hearsay and not supported by probative evidence.

No offices or employee of the Clerk's office has supported at any time with his or her oath, the verity of the Docket Sheet item or the filing date of Judge Lasker' ex parte order upon which Alleghany relies for showing filing or entry prior to the entry of the Default Judgment. By contrast the record contains the May 11, 1972 affidavit of Phillips (18a-19a), the May 12, 1972 CLERK'S CERTIFICATE NOTING DEFAULT OF JOHN LIVINGSTON, Clerk, and JUDGMENT #72,542 making the appropriate recitals by Clerk Livingston. (17a-20a).

And apart from the documents in the Clerk's office is the affidavit of Phillips FILED IN COURT on May 25, 1972 stating:

"2. The May 10th affidavit pursuant to which Mr. Bond successfully obtained the May 10 order was neither received by me nor entered on the docket sheet of the Clerk of the District Court until after May 11, 1972. The default judgment in question was submitted by myself to the Judgment Clerk and by him to John Livingston, the Clerk of the Court, in my presence on May 11, 1972 and neither that day nor the next day, May 12, 1972, as I personally verified, as did John Livingston, the Clerk

of the Court, in my presence, was there any entry on the docket sheet of Judge Lasker's order or any notice of motion made to procure such relief as would prevent entry of a default judgment. If there were Clerk Livingston's Certificate would patently be a falsehood. This Court, I am confident, knows Clerk Livingston too well to believe he would engage in such a tactic. Nor as I personally verified both on May 11 & 12th, 1972 was there any entry on the Calendar sheets of the order of Judge Lasker of May 10th referred to by Mr. Bond. I did so verify before Clerk Livingston signed the Certificate of Default. * * * Although I am now aware that the Docket sheet in the Clerk's office reflects entry of Judge Lasker's order on May 11, 1972, I know of my own knowledge that it was not since I saw the assistant clerk making the docket sheet entry on May 15, 1972. (Joint Appendix 47a-49a).

At no time has this recital under oath been controverted by affidavit of any of the above-mentioned persons or anybody else. Phillips therefor submits that under the law of evidence there is no evidence to support Alleghany's contention now made for the first time five years later on brief of a Rule 60(a) "clerical error", and thus the issue must be resolved as a matter of law in his favor.*

—
*

Attorney Bond's Mysterious Assistant

— * The affidavit of attorney Bond, sworn to May 15, 1972 in support of the motion under Rule 60(b) to vacate the Default Judgment (24a) contains the following statement:

"8. In the early afternoon of May 11, 1972, a conformed copy of the May 10, 1972 Order by Judge Lasker with Proof of Service was duly filed with the Clerk of the District Court." (27a).

But who is the mysterious person who filed it ? This question contains no answer in the record, and thus no affidavit by him !

Judge Frankel's improper conduct

F. Alleghany's reliance in its Brief upon the Opinions and Order of Judge Frankel in setting aside the Default Judgment is Misplaced, since Judge Frankel in failing to note and pass upon the foregoing legal defenses of Phillips to the motion to vacate, and in resolving conflicting affidavits of the parties in favor of Attorney Bond without an evidentiary hearing, and in acting judicially against Phillips without disclosure in the record of the fact that he was a former adversary of Phillips in private life in five Alleghany cases and, when that fact was discovered by Phillips, failing to disqualify himself, and in adopting in his Opinions a venomous and vitriolic tone without specifying a single infraction of rule, statute or law by Phillips, deprived him of an impartial administration of justice and Due Process of Law. All without jurisdiction so to do. Hunna, supra.

The facts are clearly set forth in the record. *

* (See motion in this Court by plaintiff-appellee Randolph Phillip and appended affidavit of July 20, 1972.)

POINT III

TO GRANT ALLEGHANY'S REQUEST MADE FOR THE FIRST TIME ON THIS APPEAL AND FIVE YEARS AFTER ENTRY OF THE DEFAULT JUDGMENT, THAT IT BE ALLOWED TO SUBSTITUTE A MOTION UNDER RULE 60(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR ITS ACTUAL MOTION MADE FIVE YEARS AGO UNDER RULE 60(b) THAT WAS LITIGATED BEFORE JUDGE FRANKEL, AND AFTER ALLEGHANY ON ITS OWN MOTION PROCURED DISMISSAL OF ITS APPEAL, WOULD VIOLATE THE DOCTRINE OF RES JUDICATA.

- A. The Default Judgment is res judicata. See Phillips' Memorandum in Opposition to Motion of Alleghany Corporation to dismiss appeal against it. (pp. 5-6, 9-10a). In Aerojet-General Corporation v. Askew, 511 F.2d 710 (5 Cir.1975), the Court responded in a similar situation as follows:

B. Application of the Federal Law of Res Judicata to this Case

[8,9] 1. *Scope of the cause of action.* Under the federal law of res judicata a party must raise all claims that are a part of or a defense to the cause of action under adjudication. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940); *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069

* * *

The constitutionality of F.S.A. § 253-111 as applied to Aerojet's contract was not raised by the defendant Florida state boards in the original suit by Aerojet for specific performance, but clearly it could have been. In October 1969 the Attorney General of Florida advised the state boards of his opinion that F.S.A. § 253-111 applied to the lease-option contract in question. Thus the state boards were fully aware that the Florida statute might possibly offer them a defense. They chose not to raise that defense and must now accept the consequences of their decision.

Obviously, Alleghany not having raised the defense afforded by Rule 60(a) prior to causing dismissal of its own appeal

on July 20, 1972 (Joint Appendix 95a) cannot convert its appellee's brief herein into a second suit based on the defense afforded by that Rule, when five years ago it tried its case under Rule 60(b).

B. Alleghany's Fictitious Rule 54(b) Defense

Attorney Richard L. Bond's brief states at 21-23:

- "B. The Filing by Alleghany of a Protective Notice of Appeal, Void on its Face, Did Not Divest the District Court of Jurisdiction to Vacate the Default Judgment Pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.

"Since this was a multi-defendant case at the time the notice of appeal was filed, both defendants having been served, there could be no final appealable determination absent "...an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b), Federal Rules of Civil Procedure; 28 U.S.C. §1291; * * * ."

This is an attempt by attorney Richard L. Bond to claim a Rule 54(b) defect in the appealability of the Default Judgment on May 12, 1972, so as to escape the bar of res judicata due to his waiver of Alleghany's right to appeal the judgment after he had filed his June 8, 1972 Notice of Appeal therefrom (51a) and then caused its dismissal on July 20, 1972. (95a). He achieves this result by inventing a new Rule 54(b). ! Conceding, by the dates set forth

in Alleghany's Brief that this was a one-defendant case at the time of entry of the Default Judgment on May 12, 1972, attorney Richard L. Bond states "this was a multidefendant case at the time the notice of appeal was filed". Thus there could be no "final appealable determination absent" a Rule 54(b) certificate ! (Brief 21-23). *

In any event, it is clear and confirmed by Judge Tenney (MEMO 129a) that only Alleghany had been served at the time of the entry of the Default Judgment on May 12, 1972. Thus there was not then "a multi-defendant case" in existence and the Default Judgment was appealable without a Rule 54(b) certificate. Ferguson v. Bartels Brewing Co. (Pa.), 284 F.2d 855 (2 Cir. 1961). As this Court there stated:

"In the present case one of the individuals named as codefendant - Lowell M. Birrell - has apparently not been served. Thus he is not a party to the case, and his designation as a codefendant would not bar entry of a final judgment against the other defendants who have been actually made parties. Sigmund v. General Commodities Corp., 9 Cir., 175 F.2d 952, 953; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 8 Cir., 111 F. 81, 84-85 * * * ." (284 F.2d at 855).

* Upon entry of the Default Judgment it was immediately appealable.

The judgment against Alleghany left no further damage claim against L.D.S. since the claims against each were for the same 1,899 hours of service at \$50 per hour. (Complaint, 10a) And thus terminated the litigation International Controls Corp. v. Vesco, - F.2d - (May 13, 1976), slip opinion, 3719). Directly in point is Backus Plywood Corp. v. Commercial Decal Inc., 317 F.2d 339, syllabus number (3); (2d Cir. 1963).

IV.

ALLEGHANY'S RELIANCE ON JUDGE BRIEANT'S DISMISSAL OF THE COMPLAINT IS MISPLACED. THE DISMISSAL VIOLATED THE LEGAL STANDARDS OF THE SUPREME COURT OF THE UNITED STATES RESPECTING THE "ANCILLARY" NATURE OF PROCEEDINGS FOR FEES ARISING OUT OF TRIAL OF THE ORIGINAL COMPLAINT, AND WAS IN OTHER RESPECTS DEFECTIVE AS A MATTER OF LAW.

- A. The erroneous legal standard that "a closed case" (Alleghany v. Kirby, 218 F. Supp. 164) and "the passage of time" (some 9 years) preclude the district court having "ancillary jurisdiction." (110a)

Fee proceeding, however, are "ancillary proceedings".
Fleischman Corp. v. Maier Brewing Co., 386 U.S. at 717 (1967).

The Alleghany complaint is nothing more than "a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein..." Local Loan Co. v. Hunt, 292 U.S. 234, 239, and any party whose interest is affected may assert his rights by filing the bill on his own behalf. Krippendorf v. Hyde, 110 U.S. 276, 281, 282. For the jurisdiction "the court originally acquired is not exhausted by the entry of the judgment..." Pell v. McCabe, 256 F. 512, 515. (2d Cir.) And the present action is "a continuation of the former suit." Pacific RR Co. v. Missouri Pacific Ry. Co., 111 U.S. 505, 522, cited in Martina Theatres Corp. v. Schine Chain Theatres Corp., 278 F.2d 793, 800, note 1 (2d Cir.)

"Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that (ancillary) proceeding." Street's Federal Equity Practice, vol. 2, s 1229, emphasis supplied, quoted in Pell, supra, 515. *

Thus Judge Brieant was in error, when he found lack of diversity jurisdiction, that the Alleghany v. Kirby case was "a closed case" and thus that "ancillary" jurisdiction could not attach and that "the passage of time" had precluded Phillips as a defending party in Kirby from the relief as to fees sought by the complaint.

* The Court stated in Pacific RR Co. at 522:

The bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in Krippendorf v. Hyde, 110 U. S. 276. On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in Pacific Railroad v. Missouri Pacific Railway Co., 1 McCrary, 647. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court. Minnesota Co. v. St. Paul Co., 2 Wall. 609, 623.

B. Alleghany's contention that "the principle office" of the Company is in the State of New York is not supported by probative evidence but is based on a hearsay affidavit of Richard L. Bond, Esq. (76a, par. 6) *

As Judge Leahy stated in Seward v. Niessen, 2 F. R. D. 545, 546 (D. Del. 1942):

"The affidavit of plaintiff's attorney is plainly hearsay. It is not even admissible as a vicarious admission absent corroboration of the declarant's agency."

★

Alleghany's brief states (23-25) Judge Brieant found that the complaint against Alleghany should be dismissed for lack of subject matter jurisdiction. Phillips is admittedly a citizen of New York but there is no competent evidence to show, as Mr. Bond alleged by his affidavit, sworn to June 8, 1972, that Alleghany's "principal business office is in New York". No officer, director or employee so testified. Bond's knowledge is hearsay and the basis not given. (76a)

JUDGE BRIEANT'S POST-JUDGMENT DISMISSAL
OF THE COMPLAINT AGAINST ALLEGHANY ON
SEPTEMBER 25, 1972 FOR LACK OF JURISDICTION
IS A NULLITY, SINCE THE DEFAULT JUDGMENT
ENTERED ON MAY 12, 1972 BECAME FINAL ON
JULY 20, 1972 WITH ALLEGHANY'S SELF-PROCURED
DISMISSAL OF ITS OWN APPEAL.

The jurisdictional issue was not open in the district court when Judge Brieant took it under consideration. This is a direct consequence of Alleghany's self-procured dismissal of its own appeal on July 20, 1972 (89a, 95a). The motion to dismiss ^{the complaint} ~~was~~ decided therefore without jurisdiction on September 25, 1972 (97a-98a).

As the Seventh Circuit stated in Madden v. Perry, 264 F.2d 169 (1959) at 174:

"But we dismissed the appeal without reversing and this left no case pending before Judge Perry and hence his entries of findings and conclusions thereafter were not germane to any action in his court. Their entry was error."

POINT V

SINCE JUDGE TENNEY FOUND THAT PHILLIPS' CLAIM AGAINST INVESTORS DIVERSIFIED SERVICES, INC. "FAILS BECAUSE IT DOES NOT COME WITHIN THE SCOPE" OF SECTION 64 OF THE NEW YORK GENERAL CORPORATION LAW, THAT LAW COULD NOT BE PHILLIPS' "EXCLUSIVE REMEDY." (Alleghany Brief 32-37)

- A. It should be obvious that a statute that provides no remedy because Phillips is not within its "scope" is not his "exclusive remedy".

Yet this is the non-sequitur that the IDS Brief relies upon (pp. 27-31) and which formed the basis of Judge Tenney's denial of relief to Phillips under the New York statute. (373a-374a). Referring to the statutory language of s 64, Judge Tenney drove his point home by stating "Second, Phillips's own services as attorney pro se do not qualify as 'reasonable expenses, including attorneys' fees' for which the statute permits reimbursement." (372a)

Quoting Dallas Savings Bank v. United States, 19 Wall. 227.

Mr. Justice Holmes set forth the law of "exclusive remedy in

United States v. Chamberlain, 219 U.S. at 260:

"It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other States, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.

* We note that this language does not exclude remedies provided by other statutes, but only "common law remedies". This makes available to plaintiff the 1969 Minnesota indemnification statute, as set forth in Phillips' main brief. (pp. 4-5)

"But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other.

Since Phillips, according to Judge Tenney, is not "one to whom the statute is a rule of conduct" he is not "confined to the remedy pointed out in the statute" (219 U.S. at 260), and may resort to the common law remedies pleaded in Counts II, III and IV and the Constitutional remedies pleaded in Counts V and VI of his amended complaint. (148a-151a). Nor is he barred from enforcing his remedy under Minnesota statutory law despite the contrary contention in Alleghany's brief. (30-33).

B. Phillips' contention on the merits that he does come within the scope of Section 64 of the General Corporation Law is not met on the merits of Section 7(9) of The New York Civil Practice Act (now CPLR 105(c), nor of point II of Phillips argument, nor of point III. and IV.

We respectfully refer the Court to pp. 44-59 of our main Brief.

C. IDS in its brief cites two inapposite cases to buttress Judge Tenney's ruling. (Brief 36)

Neither in Trustees v. Greenough, 105 U.S. 527, 537, 538 nor in Masholie v. Salvator, 182 Masholie v. Salvator, 182 Misc. 523, 46 N.Y.S. 2d 596, 599 (Sup.Ct. Queens Co. 1944), affirmed in part, modified in part on other grounds, 269 App. Div. 846, 55 N.Y.S. 2d 395 (2d Dep't. 1945) were the "services" at issue those of a party acting pro se. Thus the issue of the party pro se's rights under 28 U.S.C. s 1654 and s 7(9) of the N.Y. Civil Practice Act (now CPLR s 105(c) and of discrimination against them in violation of the party pro se's Constitutional right to "self-representation" Faretta v. California, 422 U.S. 806, 830 n. 39 (Phillips' Brief 49) and of infringement of his Constitutional right to speak in court in his own defense by depriving him of compensation for the same successful services for which attorneys-at-law are compensated, thereby depriving him of the Equal Protection of the law guaranteed by s 7(9) of the New York Civil Practice Act, ^{*}were not the subject matter of Trustees v. Greenough, supra, or Masholie, supra.

* And violating the Constitutional rule under the First Amendment as set forth in Perry v. Sanderman, 408 U.S. 593, 597. (Phillips' main brief, pp. 54-55.)

D. While it may be true as IDS states that "We have found no case in which a director-defendant has sought, much less received, reimbursement for his own time" (Brief 36), there are at least three cases in which Phillips acting as a party pro se has been reimbursed by the federal courts "for his own time".

In his memoranda below Phillips cited In re United Corporation, 249 F.2d 168 (3d Cir.1957) in which Phillips received an award of \$50,000 compensation for 5,000 hours of losing and winning time, the losing time dragging down the hourly rate. IDS's brief incorrectly quotes the Opinion therein as having "stated that, '...Phillips is not and a lawyer /cannot be compensated as such.'" (IDS brief 38). Reference to the page of the Opinion in question (p.177) shows that the Third Circuit was quoting the S.E.C. and the S.E.C. was reversed.

In two of these cases there were objections to Phillips being awarded such compensation because he was not a lawyer. In each the objections were overruled. In re United Corporation, 119 F.Supp.524 (D.C. Del.), which explicitly holds that a \$2,000 award is for acting as his own lawyer. (p.); In the Matter of The Baltimore & Ohio Railroad Co.(USDC D. Md., 3 Judge Court, Soper, Dobie, CCJ, and Chesnut, D. J.) (Unreported Opinion filed July 27, in Bankruptcy Docket No. 9905), \$5,000. award,

VI.

NONE OF ATTORNEY BOND'S ARGUMENTS ON BEHALF OF INVESTORS DIVERSIFIED SERVICES AND THE ATTORNEY AT LAW'S MONOPOLY TO BE PAID UNDER SECTION 64 OF THE NEW YORK GENERAL CORPORATION LAW CONFRONT THE CONSTITUTIONAL ISSUES AS POSED BY PHILLIPS' ARGUMENT BASED ON THE MOST RECENT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

We refer to Faretta v. California, 422 U.S. 806, 830 n. 39 (application argued in Phillips' brief at 49, 54; and Perry v. Sandermann, 408 U.S. at 597 (application argued at 54, 55).

VII.

ATTORNEY BOND MAKES A DOUBLE MISREPRESENTATION IN HIS STATEMENTS THAT "PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS."
(Brief 41-50)

1. In order to prevent Phillips obtaining the benefit of the tolling provision of New York Civil Practice Law and Rules adds a provision to the New York Civil Practice Act which at no time was a part thereof. *

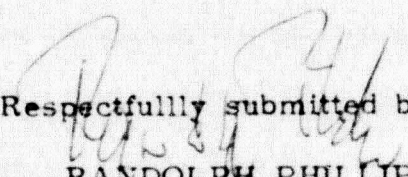
* Attorney Bond's brief (p. 49) adds paragraph (3) to N. Y. C. P. L. s 207, which came into existence on September 1, 1963, to New York's Civil Practice Act 19 (the predecessor statute) whose tolling provisions applied to Phillips' claim under s 19, which Judge Tenney found accrued on June 5, 1963. (372a-373a) Subsection (3) of s 207 of the CPLR, the long-arm provision upon which Mr. Bond relies to establish there was "long arm" jurisdiction, over IDS on June 5, 1963, was thus not in existence at that date !

2. IDS seeks to represent that "Section 205(a) of the New York Civil Practice Law and Rules" is determinative of the fact that "The instant action was not commenced within six months after termination of the state court action, rather it was commenced six years later." (Brief 48, IDS's emphasis). Counsel omit that Section 205(a) is not a "united in interest" statute. The applicable statute (s 16 of the New York Civil Practice Act, now CPLR 203(b) is the "united in interest" statute. Plainly the existence of one statute does not negate rights under another statute. (see Phillips brief 30-32)

The 1969 Minnesota Statute is retroactive.

IDS claims that "retroactivity (is) not found in the statute." (31). Yet the power to indemnify applies to "any person who was a party" to a "completed action" and "shall continue as to a person who has ceased to be a director..." (Phillips brief 4-5). A "RETROACTIVE STATUTE", according to Black's Law Dictionary (4th ed.), is "A statute which creates a new obligation on transactions ...already past." This is exactly what the Minnesota statute does, as shown by the above quoted words."

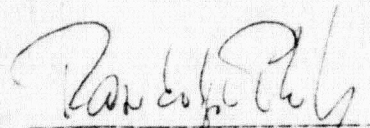
May 16, 1977

Respectfully submitted by

 RANDOLPH PHILLIPS
 Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of my Reply Brief herein by delivering two copies of the same to Richard L. Bonds, Esq., attorney for Appellees, at his office 430 Park Avenue, New York City.

May 16, 1977.


Randolph Phillips